UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EYM KING OF MICHIGAN, LLC d/b/a.
BURGER KING

Respondent

and **CASE 07-CA-118835**

MICHIGAN WORKERS ORGANIZING
COMMITTEE

Charging Party

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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I. BRIEF IN SUPPORT OF CROSS-EXCEPTIONS

A. The ALJ improperly concluded that employee Claudette Wilson worked for the Michigan Worker's Organizing Committee (Charging Party) while employed by Respondent's predecessor V&J Enterprises. (ALJD P 2, L 29-30)

The record evidence clearly shows that Wilson's credible and unrefuted testimony indicates that Wilson began her employment with the Charging Party in August 2013, after the sale of the franchise to Respondent. (Tr 60, 112) The decision should be modified to reflect this fact.

B. The ALJ improperly concluded that Respondent Manager Charlene Pack approached only employee Claudette Wilson in the parking lot on September 19, 2013. (ALJD P 4, L 19-20).

The record evidence clearly shows that employee Jaleesa Johnson was present when Pack approached the vehicle and asked what Wilson and Johnson were doing in the parking lot. As Wilson was collecting information from Johnson in the parking lot they were approached by Respondent General Manager Pack. Pack asked Wilson and Johnson "what y'all doing." Pack noticed that Johnson was filling out a questionnaire. Pack told Wilson she could not be soliciting around the building. Wilson told Pack she was working. Johnson then got out of the vehicle and left. (Tr 84-85, 539-540) The decision should be modified to reflect this fact.

C. The ALJ failed to indicate that Respondent's Assistant Manager Edward Eberhart read the Respondent's unlawful Confidentiality Rule to its employees at the group meeting on September 21, 2013. (ALJD P 4, L 33-40).

The record evidence clearly shows that Respondent's Assistant Manager Edward Eberhart read the alleged unlawful rule at the meeting. Respondent General Manager Pack testified that Eberhart read the rule to employees (Tr 555), and employee Frazier corroborated her testimony. (Tr 219) The decision should be modified to reflect this fact because if the rule is found to be unlawful, as argued below, the oral recitation of the rule at the meeting would independently violate Section 8(a)(1) of the Act.

D. The ALJ failed to indicate that Respondent Manager Charlene Pack heard all the cook employees getting loud at the group meeting on September 21, 2013. (ALJD P 5, L 1-2).

Respondent General Manager Pack testified that about five minutes into the cashiers meeting, while Pack was discussing customer complaints and how to increase speed of service, Pack noticed a commotion ***with all the cooks:***

> "I noticed the group over there, *the cooks* getting real loud, and then I just continued meeting with my cashiers, *then I noticed them getting louder* where I couldn't hear myself. So I looked over there, and then I was like, you know, what's going on, what are *ya'll talking about*? (Tr 549)

The decision should be modified to reflect this fact because it establishes that Respondent targeted Wilson for her protected concerted and union activities, and that similarly situated employees were not silenced by Pack as Wilson was. This is further evidence of Respondent's animus directed at Wilson for her protected concerted and union activities.

E. The ALJ failed to find Respondent's code of conduct rule prohibiting falsification, alteration, misrepresentation, or removal of company documents and/or records, or documents required by law, unlawful. (ALJD P 11, L 37-43).

The ALJ noted that while the inclusion of the word misrepresentation was violative because it could reasonably be read to apply to verbal opinion statements about company documents,…it was not unlawful because the rule does not prohibit disclosure of company documents, but material changes or removal of such documents to which employees are not entitled.

The provision is unlawful because, as the ALJ notes, the misrepresentation language is violative because it does not distinguish between mere misrepresentations and intentional misrepresentations. Employees who merely misrepresent information contained in company documents are not making malicious misrepresentations, or maliciously false statements. The Board has held similar provisions unlawful because the maintenance of rules prohibiting employees from making false statements, as compared to maliciously false statements, violate Section 8(a) (1). ***Lafayette Park Hotel,*** 326 NLRB 824,828 (1998). enfd. mem., 203 F.3d 52 (D.C. Cir. 1999); ***American Cast Iron Pipe Co.***, 234 NLRB 1126, 1131 (1978), enfd. 600 F.2d 132, 137 (8th Cir. 1979). In enforcing the Board order in ***American Cast Pipe***[1], the court noted that "punishing

[1] As the ALJ himself noted at ALJD, P 12, L 1-7 in discussing the handbook rule regarding false statements, "I find this rule violative in potentially exposing employees to discipline for making statements which are merely false, as opposed to being made maliciously and/or knowingly false… Likewise, the language in this rule is not limited to intentional or malicious misrepresentations, but includes any misrepresentation made in ignorance, mistake or innocence.

employees for distributing merely "false" statements fails to define the area of permissible conduct in a manner clear to employees and thus causes employees to refrain from engaging in protected concerted activities. Accordingly, the rule violates Section 8(a)(1) of the Act because it subjects employees to discipline for merely misrepresenting information in company documents.

Further, the language in the rule "***or*** removal of company documents and/or records," is broad enough to include payroll stubs or benefits data, work schedules, and other information related to terms and conditions of employment that are not proprietary or confidential. Employees have a Section7 right to discuss their terms and conditions of employment and to disclose documentation of such to their co-workers, union representatives and to third parties. ***Bigg's Foods,*** 347 NLRB 425, 425 fn. 4 (2006). See also ***Cintas Corp. v. NLRB***, 482 F.3d 463, 467-470 (D.C. Cir 2007); and ***Flex Frac Logistics, LLC***, 358 NLRB No. 127, Slip op at 1 (Sept. 11, 2012)[2] (finding prohibition on disclosure of "personnel information and documents " to persons "outside the organization" to be facially unlawful). Accordingly, the rule violates Section 8(a)(1) because it represents a ***blanket*** prohibition on the disclosure of ***any*** company documents or records whether or not they could be categorized as proprietary and/or confidential.

F. The ALJ's failure to find Respondent's Confidentiality Rule unlawful. (ALJD P 13, L 6-14).

[2] ***Flex Frac Logistics, LLC***, 358 NLRB No. 127, Slip op at 1 (Sept. 11, 2012) was issued by a panel that under ***NLRB v. Noel Canning***, 199 LRRM 3685 (June 26, 2014), was not properly constituted. It is the General Counsel's position that ***Flex Frac Logistics LLC*** was soundly reasoned, and the General Counsel therefore urges that the Board adopt the rationale as its own.

The ALJ found the rule lawful without citing any case law, indicating that although employees could find the rule applying to protected conduct, he did not. The ALJ noted that the rule's copying restrictions would apply only to documents that employees could not possess, and that investigators from the NLRB could subpoena documents if necessary.

In ***Hyundai American Shipping, Inc.***, 357 NLRB No. 80 (2011), the Board affirmed the ALJ finding that Respondent violated Section 8(a) (1) by maintaining or enforcing a rule that prohibited employees from disclosing information from messages or emails, instant messaging and phone systems to unauthorized personnel. As the ALJ pointed out, "employees should not have to decide at their own peril what information is not lawfully subject to such a prohibition."

Respondent's employees are placed in a similar position in the instant matter. Here, employees have to decide what constitutes company business and what constitutes a business transaction since those concepts are not defined in the confidentiality rule. These provisions clearly chill Section 7 rights with mistakes subjecting employees to discipline up to and including termination.

The explanation of the rule is unlawfully overly broad as well. It requires employees to maintain confidentiality of information related to their terms and conditions of employment such as management changes (supervisory hierarchy), business expansion (facilities, job availability), and Respondent's earnings (bargaining issues with union representatives). It further prohibits employees from discussing threatened legal claims or lawsuits, or speaking about these matters to union representatives or investigators such

as the NLRB without prior approval, which would interfere with protected concerted activities and Board investigations.

The rule also prohibits employees from speaking to ***anyone*** outside the company about company business, and from removing or making copies of documents of ***any*** kind without management approval. These restrictions would reasonably be interpreted by employees to prohibit employees from discussing and providing information to union representatives regarding payroll documents, employee wage rates, names, phone numbers and addresses, disciplinary write-ups, work rule changes, schedule changes, meeting notices and/or participating and providing evidence in Board investigations. See ***TeleTech Holdings, Inc.***, 333 NLRB 402, 403 (2001); ***Brunswick Corp.***, 282 NLRB 794, 795 (1987); ***DirectTV U.S. DirectTV Holdings, LLC***, 359 NLRB No. 54 (January 25, 2013); ***Flex Frac Logistics***, supra. ***Bigg's Foods,*** at 425 fn. 4, and ***Cintas Corp. at 467-470*** (enforcing a Board decision that found unlawful an employer rule requiring employees to maintain confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters).

When read in its totality, employees are left with the impression that they cannot discuss any information that relates to the company with anyone outside the company including investigators without approval. Accordingly, the confidentiality rule, and the oral recitation of the rule at the September 21, 2013 employee meeting by Respondent's Assistant Manager Eberhart, each violate Section 8(a)(1) of the Act.

G. The ALJ failed to find unlawful Respondent's Manager Charlene Pack's statements to employees at the group meeting on September 21, 2013, that employees should not discuss company business with anyone outside the company. (ALJD P 13, L 29-33).

The ALJ decided that the record was insufficiently clear to determine Respondent's Manager Charlene Pack violated the Act except for her reading of the unlawful solicitation and loitering rule during the meeting.

The record evidence clearly shows that Wilson's credible and unrefuted testimony indicates that Pack stated that talking to employees outside the facility is considered solicitation and employees should not do that. Wilson testified that Pack said "that the workers are not supposed to give out information, and that if anyone walked up to the counter asking about hours or wages or any type of work business, that we weren't supposed to answer, we weren't supposed to talk to them, and we were never supposed to tell them any of the Company's business." (Tr 96) Employee McGee confirmed he heard Pack say employees were not supposed to talk to anyone outside the company about company business. (174, 179) Employee Frazier questioned Pack asking her how giving someone your name and address is soliciting. Pack responded it is because she says it is. (Tr 213) After this Pack read other policies in the handbook as well. Then, Assistant Manager Eberhart read the confidentiality policy to employees in the same meeting. (Tr 219, 555; GC Ex 2, p 19-20) The confidentiality policy itself prohibits employees from discussing company business with anyone from outside the company:

> "..Do not discuss EYM King of Michigan, LLC. business with anyone who does not work for the Company. Never discuss business transactions with anyone who does not have a direct association with the transaction…. (GC Ex 2, p 19-20, in part)

Accordingly, Pack's comments to not discuss company business with anyone outside the company violate Section 8(a) (1) of the Act, as does the recitation of the confidentiality rule in the meeting because they prohibit discussion of any company business with anyone outside the company, thereby chilling Section 7 rights.

II. CONCLUSION

Counsel for the General Counsel respectfully requests that the Board grant the requested Cross-Exceptions and modify the Administrative Law Judge's Decision accordingly.

Respectfully submitted this 7th day of November, 2014

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CERTIFICATE OF SERVICE

I certify that on the 7th day of November 2014, I e-filed **COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION** and served a copy electronically on the following parties of record:

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